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The maxim is merely a method of expressing a consideration of policy, and the maxim is so much broader than the legitimate scope of the policy that it would be well to discard it altogether. The real question at issue is whether in any particular case the ends of the law will be furthered or defeated by granting the relief asked. That the direct enforcement of the contract is generally undesirable may be taken for granted.<sup>9</sup> Furthermore, where recovery of the reasonable value of goods sold or services rendered is sought, the result of granting such relief is to assure to one who performs an unlawful agreement a right to obtain money in exchange for his services which is likely to be the chief object of his contract. This form of relief thus tends to execute the illegal agreement, and it should therefore be granted somewhat sparingly.<sup>10</sup> If, however, the plaintiff asks merely for rescission and the restoration of property transferred without consideration, to allow him recovery will often prevent the otherwise probable execution of the contract, and in any case is a repudiation and not an execution of the contract. Under these circumstances there would seem to be in general no sufficient reason for refusing to entertain a suit based upon ordinary equitable or quasi-contractual principles such as unjust enrichment or fraud. If, however, the parties, as a result of their contract, have committed a serious crime, there is stronger reason for saying that they have forfeited all right to legal aid. A recent case which denied to a participant in a felonious marriage the recovery of property conveyed to the supposed wife who had induced the crime in order to defraud him of this property may therefore be supported.<sup>11</sup> *Szlawzis v. Szlawzis*, 255 Ill. 314, 99 N. E. 640. It would seem doubtful, however, if public policy is really served by such a decision, for the protection afforded the defrauder probably encourages him more than it frightens others. The reluctance of the courts to adjust the rights of criminals is hardly a sufficient reason for allowing clever scoundrels to defraud their victims whenever they can involve them in crime.

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EFFECT OF BAD MOTIVE IN THE LAW OF TORTS. — A novel situation in a recent Massachusetts case presents in an interesting way the effect of bad motive in the law of torts. A landowner erected a large sign on her land bearing the words, "For Sale. Best Offer from Colored Family." Although intending to sell, the defendant was actuated by ill-will toward

<sup>9</sup> It is permitted only in case the illegality of the contract is a mere directory provision, and in some cases where the contract is illegal only because *ultra vires*. *Larned v. Andrews*, 106 Mass. 435; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390.

<sup>10</sup> See KEENER, QUASI-CONTRACTS, 262; *Stewart v. Thayer*, 170 Mass. 560, 563, 49 N. E. 1020, 1022. This objection does not apply if most of the contract is still executory.

<sup>11</sup> See RECENT CASES, p. 756. Many even of the more modern cases take this view. *Knight v. Linzey*, 80 Mich. 396, 45 N. W. 337; *Schmitt v. Gibson*, 12 Cal. App. 407, 107 Pac. 571. See *Lowell v. Boston & Lowell R. Co.*, 23 Pick. (Mass.) 24, 32; *Tracy v. Talmage*, 14 N. Y. 162, 181. *Contra*, *Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934; *Stewart v. Wright*, *supra*. The last two cases are perhaps distinguishable from the principal case, since in them there was in substance no execution of the illegal contract but merely an elaborate pretense carried out for the purpose of defrauding the plaintiff.

the plaintiffs, and by the threatened sale was seriously interfering with their real-estate business. An injunction, however, was denied. *Holbrook v. Morrison*, 100 N. E. 1111 (Mass.).

Accepting as true the proposition that intentional damage is *prima facie* tortious and requires a justification,<sup>1</sup> the problem is under what circumstances a bad motive will deprive the defendant of a justification otherwise good? A justification may be said to be the law's permission to injure others because of some countervailing benefit to society outweighing the harm done. The benefit may assume many forms: prevention of crime, freedom of speech, free competition, or the free beneficial use of property by its owner. To escape liability the defendant must show that he was acting under some such justification, that is, accomplishing the purpose or achieving the results which the law aims at in granting it. In many cases, as where a public officer arrests a supposed felon, or where defamatory statements are made in judicial proceedings, the law disregards motive altogether, notwithstanding the prisoner's innocence or the statement's falsity. It is so important that crime be detected and that justice be administered fearlessly, that the law must run the risk of occasional mistakes and malicious motives. On the other hand, in some cases the slightest taint of bad motive influencing conduct may vitiate a justification, as where "actual malice" destroys a qualified privilege in defamation. In cases of this kind the benefit to the public is not great enough to outweigh the individual harm. There is no benefit to society in a freedom to do these acts when they are inspired by malice.<sup>2</sup>

It is submitted that all justifications will fall into one or the other of these two classes, the first where the objects sought for are so important that motive must be ignored, the second where the objects are not so important but that the presence of ill-will may turn the scale.<sup>3</sup> In the first, bad motive can only be evidence as to whether the act is the one excused, that is, whether the defendant's conduct is of the kind causing the desired benefit, irrespective of the motive as a cause. Instead of speaking of a wholly bad motive as depriving the defendant of a justification, it is submitted that the only importance of motive is as a fact from which inferences can be drawn as to the existence of the necessary elements of the justification, or, in other words, whether the acts are serving the purposes or achieving the results at which the law aims. Thus if a man is really competing no amount of ill-will should deprive him of his

<sup>1</sup> One seems justified in the light of recent decisions and discussions in assuming this as a fundamental proposition in the law of torts. See *Skinner & Co. v. Shew & Co.*, [1893] 1 Ch. 413, 422; *Aikens v. Wisconsin*, 195 U. S. 194, 204, 25 Sup. Ct. 3, 5. See also POLLOCK ON TORTS, 9 ed., 22, 23. The question of a bad motive does not usually arise in cases of unintentional harm, but the analysis here suggested seems equally applicable.

<sup>2</sup> Malicious prosecution lends itself to the analysis here ventured. The wrong done is justified on public policy irrespective of motive if there is reasonable cause; where there is no reasonable cause there is still a justification unless bad motive appears. The law's object is so important that the act is protected unless both reasonable cause and honest motive are absent.

<sup>3</sup> It is obvious that a particular justification may fall in either class according to different interpretations of public policy. Cf. *Munster v. Lamb*, 11 Q. B. D. 588 (1883), with *Gilbert v. The People*, 1 Denio (N. Y.) 41 (1841). See also *McLaughlin v. Cowley*, 127 Mass. 316, 319.

justification based on the benefits of free competition,<sup>4</sup> but where one engages in business solely to injure the plaintiff without seeking or expecting personal gain the interference with the plaintiff's business is unjustified,<sup>5</sup> the motive, however, being merely evidence that real competition does not exist. In the second class motive is material in and of itself.<sup>6</sup>

In the principal case the justification is the right to sell property as a necessary incident of beneficial ownership. Assuring to individuals the benefits of ownership is considered so important that motive has always been disregarded; therefore malice is relevant only as it sheds light on whether a real or a pretended sale is contemplated. If a mere pretense, the law's object is not achieved, and the plaintiff's damage is unjustified.<sup>7</sup> But if a real sale is intended, ill-will should not take away the justification.<sup>8</sup>

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CONTRACTS RELIEVING FROM LIABILITY FOR NEGLIGENCE. — It is generally admitted that in the absence of special circumstances a contract exempting one from liability for negligence is valid. Moreover, the result is the same whether the negligence is positive or negative in nature, whether the liability arises as a result of personal negligence or by virtue of *respondeat superior*,<sup>1</sup> or whether the damage is to person or property. To that extent the policy in favor of freedom of contract overrides the general objection that such contracts remove an incentive to carefulness.<sup>2</sup>

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<sup>4</sup> *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 163 (1900). So also if he is getting a real benefit from a use of his property. *Falloon v. Schilling*, 29 Kan. 292 (1883). In this case the defendant erected cheap dwelling-houses on his land and rented them to negroes in order to influence the plaintiff who lived on adjoining property to sell to him at a low price. Although the defendant's dominant motive was to injure the plaintiff, he was receiving real benefit from the houses and was thus making a beneficial use of his property. The court refused to interfere.

<sup>5</sup> *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909); *Dunshee v. The Standard Oil Co.*, 152 Ia. 618, 132 N. W. 371 (1911). So also where one shoots off guns on his land, not for any benefit to himself but only to frighten the wild fowl away from his neighbor's decoy pond, an action will lie. *Keeble v. Hickeringill*, 11 East, 574 note (1706). The cases holding that no action lies for the erection of fences purely from spite are irreconcilable with the views here expressed, but a respectable minority of well-considered cases hold that such an action is maintainable. For a discussion of the cases involving drainage and spite fences, see Professor Ames's article in 18 HARV. L. REV. 411, 414, 415.

<sup>6</sup> Numerous instances where motive is material are given in 18 HARV. L. REV. 411, 416, 417, 418. To the ones there given may be added the cases involving the enticement of a wife to leave her husband. *Bennett v. Smith*, 21 Barb. (N. Y.) 439 (1856); *Tasker v. Stanley*, 153 Mass. 148 (1891).

<sup>7</sup> The court in the principal case says, "If she had put up the sign and had caused the advertisements to be inserted without any intention of selling her property but solely with the purpose of injuring the business and property of the complainants, there can be no doubt that such conduct on her part would have been actionable." *Holbrook v. Morrison*, 100 N. E. 1111. To the same effect are *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909); *Dunshee v. The Standard Oil Co.*, 152 Ia. 618, 132 N. W. 371 (1911).

<sup>8</sup> For general discussions as to the place of motive in the law of torts, see 8 HARV. L. REV. 1; 18 HARV. L. REV. 411; 22 HARV. L. REV. 501.

<sup>1</sup> This distinction is suggested in *Little Rock & Ft. S. Ry. Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808, and in *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149.

<sup>2</sup> *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385; *Dodd v.*